UNITED NATIONS

GENERAL
ASSEMBLY

Distr.
LIMITED

A/CN.9/WG.V/WP.36
6 May 1992

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on the New International
Economic Order
Fifteenth session
New York, 22 June - 2 July 1992

PROCUREMENT

Revised draft articles of Model Law on Procurement

Report of the Secretary-General

CONTENTS *

	Page
INTRODUCTION	5
PREAMBLE	6
CHAPTER I. GENERAL PROVISIONS	7
Article 1. Scope of application	7
Article 2. Definitions	7
Article 3 bis. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	9
Article 4. Procurement regulations	10

* Gaps appearing in the numbering of the sections and the articles are due to the deletion and consolidation of provisions at various stages of the preparation of the draft Model Law.

8538T V.92-53975

Page

Article 5. Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement 10

Article 7. Methods of procurement 11

Article 8. Qualifications of contractors and suppliers 13

Article 8 bis. Prequalification proceedings 15

Article 8 ter. Participation by contractors and suppliers 17

Article 9 bis. Form of communications 19

Article 10. Rules concerning documentary evidence provided by contractors and suppliers 21

Article 10 ter. Record of procurement proceedings 21

Article 10 quater. Inducements from contractors and suppliers 24

CHAPTER II. TENDERING PROCEEDINGS 24

SECTION II. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY 24

Article 12. Solicitation of tenders and of applications to prequalify 24

Article 14. Contents of invitation to tender and invitation to prequalify 25

Article 17. Solicitation documents 27

Article 19. Charge for solicitation documents 30

Article 20. Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents 30

Article 22. Clarifications and modifications of solicitation documents 31

Page

SECTION V. SUBMISSION OF TENDERS 32

Article 23. Language of tenders 32

Article 24. Submission of tenders 32

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders 33

Article 26. Tender securities 34

SECTION VII. EVALUATION AND COMPARISON OF TENDERS 36

Article 27. Opening of tenders 36

Article 28. Examination, evaluation and comparison of tenders 37

Article 29. Rejection of all tenders 40

Article 30. Negotiations with contractors and suppliers . . 40

Article 32. Acceptance of tender and entry into force of procurement contract 41

CHAPTER III. PROCUREMENT BY MEANS OTHER THAN TENDERING PROCEEDINGS 43

SECTION I. TWO-STAGE-TENDERING PROCEEDINGS 43

New article 33 bis. Conditions for use of two-stage tendering 43

Article 33 bis. Procedures for two-stage tendering 44

SECTION II. REQUEST-FOR-PROPOSALS PROCEEDINGS 45

Article 33 ter. Conditions for use of request for proposals 45

Article 33 quater. Procedures for request for proposals . . 45

SECTION III. COMPETITIVE-NEGOTIATION PROCEEDINGS 48

New article 34. Conditions for use of competitive negotiation 48

Article 34. Procedures for competitive negotiation 49

SECTION IV. REQUEST-FOR-QUOTATIONS PROCEEDINGS 49

New article 34 bis. Conditions for use of request for quotations 49

Article 34 bis. Procedures for request for quotations . . . 50

Page

SECTION V. SINGLE-SOURCE PROCUREMENT 50

Article 35. Single-source procurement 50

CHAPTER IV. REVIEW 52

Article 36. Right to review 52

Article 37. Review by procuring entity or by approving authority 53

Article 38. Administrative review 54

Article 39. Certain rules applicable to review proceedings under article 37 [and article 38] 56

Article 40. Judicial review 56

Article 41. Suspension of procurement proceedings 56

INTRODUCTION

1. The Commission decided at its nineteenth session in 1986 to undertake work in the area of procurement as a matter of priority and entrusted that work to its Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work at its tenth session in October 1988. It devoted that session to deliberations on the basis of a study prepared by the Secretariat that discussed possible objectives of national procurement policies and that examined national procurement laws and practices and the roles and activities of various international institutions and development funding agencies in connection with procurement (A/CN.9/WG.V/WP.22). After completing its consideration of the study the Working Group requested the Secretariat to prepare a first draft of a Model Law on Procurement and an accompanying commentary taking into account the discussions and decisions at the session (A/CN.9/315, para. 125).

2. The first draft of articles 1 to 35 of the Model Law on Procurement and the accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session in February 1990. The Working Group agreed that the commentary would not be revised until after the text of the Model Law had been settled and requested the Secretariat to revise the first draft of articles 1 through 35 to take account of the discussion and decisions at its eleventh session (A/CN.9/331, para. 222). At the twelfth session, the Working Group had before it the second draft of articles 1 through 35 (A/CN.9/WG.V/WP.28) as well as draft provisions on review of acts and decisions of, and procedures followed by, the procuring entity (draft articles 36 through 42, contained in A/CN.9/WG.V/WP.27). At that session, the Working Group reviewed the second draft of articles 1 through 27. At the thirteenth session, the Working Group reviewed the second draft of articles 28 to 35, and the provisions on review (article 36 to 42). It did not have sufficient time to again review draft articles 1 to 27, which had been revised to take account of the decisions at the twelfth session, and decided to consider those articles at its fourteenth session. It also requested the Secretariat to revise articles 28 to 42, taking into account the discussions and decisions at the thirteenth session (A/CN.9/356, para. 196).

3. At the fourteenth session, the Working Group reviewed articles 1 to 27 as revised following the twelfth session (contained in document A/CN.9/WG.V/WP.30), as well as articles 28 to 42, revised to reflect the decisions taken at the thirteenth session (document A/CN.9/WG.V/WP.33). Also reviewed by the Working Group was the annex to document A/CN.9/WG.V/WP.33, which contained several new provisions that have been added either as a result of decisions taken at the thirteenth session or at the initiative of the Secretariat, as well as a number of changes to the first portion of the Model Law (articles 1 to 27) that flowed from the Working Group's decisions at the twelfth session with regard to articles 28 to 42. The Working Group also had before it the note on suspension of the procurement proceedings that it had requested at the thirteenth session (document A/CN.9/WG.V/WP.34). The Working Group requested the Secretariat to revise the draft articles of the Model Law to reflect the deliberations and decisions at the fourteenth session. That revision is presented in this report. The Working Group also agreed that a commentary giving guidance to legislatures enacting the Model Law should be given priority, without precluding the possibility of preparation of

commentaries with other functions at a later stage. It was further agreed that completion of the Working Group's consideration of the Model Law should not be delayed until the preparation by the Secretariat of a draft commentary (A/CN.9/359, paras. 248 and 249).

4. Throughout the present document, changes of and additions to wording that appeared in earlier drafts of the Model Law are underlined, except in the case of headings to articles, all of which are underlined as a matter of style. Deletions from earlier drafts are indicated in notes following each article.

PREAMBLE 1/

WHEREAS the Government of this State considers it desirable to regulate procurement of goods and construction so as to promote the objectives of:

(a) maximizing economy and efficiency in procurement;

(b) fostering and encouraging participation in procurement proceedings by contractors and suppliers, 2/ including, where appropriate, participation by contractors and suppliers regardless of nationality, and thereby promoting international trade;

(c) promoting competition among contractors and suppliers for the supply of the goods or construction to be procured;

(d) providing for the fair and equitable treatment of all contractors and suppliers;

(e) promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) achieving transparency in the procedures relating to procurement,

Be it therefore enacted as follows.

Notes

1. As noted in A/CN.9/359, para. 15, the Working Group affirmed at the fourteenth session its earlier decision that the statement of objectives should be set forth in a preamble. At the same time it was recognized that in some States it was not the practice to include preambles and it was therefore agreed that it should be made clear, perhaps in the commentary, that enacting States had the option of setting forth the statement of objectives in a substantive provision. Consideration might also be given to including a footnote in the text of the Model Law along the following lines:

> "In enacting the Model Law, States in which it is not the practice to include a preamble in legislation may incorporate the statement of objectives in the substantive provisions of the Law instead of in a preamble."

At the same time, the Working Group may wish to consider whether it at all desirable to include on the face of the Model Law footnotes giving guidance to

legislatures enacting the Model Law. It might be considered preferable to confine such guidance to the commentary.

* * *

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application *

(1) This Law applies to all procurement by procuring entities, except as otherwise provided by this article.

(2) This Law does not apply to

(a) procurement involving national security or national defence,

(b) ... (the enacting State may specify in this Law additional types of procurement to be excluded), or

(c) procurement of a type excluded by the procurement regulations,

except where and to the extent that the procuring entity declares to contractors and suppliers when first soliciting their participation in the procurement proceedings that this Law does apply. 1/

*/ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

Note

1. Paragraph (2) has been restructured and reformulated pursuant to A/CN.9/359, paras. 22 and 23.

* * *

Article 2. Definitions

For the purposes of this Law:

(new a) "procurement" means the acquisition by any means, including by purchase, rental, lease or hire-purchase, of goods or of construction, including services incidental to the supply of the goods or to the construction if the value of those incidental services does not exceed that of the goods or construction themselves;

(a) "procuring entity" means:

(i)

Option I for subparagraph (i)

any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except . . . . .; (and) 1/

Option II for subparagraph (i)

any department, agency, organ or other unit, or any subdivision thereof, of the ("Government" or other term used to refer to the national Government of the enacting State) that engages in procurement, except . . . . . .; (and) 1/

(ii) (each State enacting this Model Law inserts in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of "procuring entity").

(b) "goods" includes raw materials, products, equipment, systems 2/ and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity;

(c) "construction" means all work associated with the construction, re-construction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as drilling, mapping, satellite photography, seismic investigations and similar activities incidental to such work if they are provided pursuant to the procurement contract; 3/

(d) [deleted] 4/

(e) [deleted] 5/

(f) [incorporated in article 26 (new 1)] 6/

(g) "currency" includes unit of account;

(g bis), (g ter), (g quater), (h), (h bis), and (i) [deleted] 7/

(i bis) "contractor or supplier" means any party or potential party, according to the context, to a procurement contract with the procuring entity; 8/

(j) [incorporated in article 28 (1 bis) (a)] 9/

Notes

1. See A/CN.9/359, para. 28.

2. The Working Group may wish to consider whether the word "systems", which has been added pursuant to A/CN.9/359, para. 29, should be retained. In doing so, it may be borne in mind that that word is vague and that it is questionable whether it is consistent with the notion of a physical object, which is an essential element of the definition. The word may also raise difficulties in translation.

3. See A/CN.9/359, para. 30.

4. See A/CN.9/343, para. 34.

5. See A/CN.9/343, para. 118.

6. The definition of "tender security" has been incorporated in article 26 pursuant to A/CN.9/359, para. 140.

7. The definitions of the procurement methods available under the Model Law have been deleted pursuant to A/CN.9/359, para. 33.

8. In order to simplify the Model Law, the Working Group may wish to consider replacing the words "contractor and supplier" and the words "contractor or supplier" which are used throughout the Model Law by the word "supplier". A definition of the term "supplier" could then be included in subparagraph (i)(bis) to indicate that that term referred to all types of possible parties to a procurement contract, including "contractors".

9. In A/CN.9/359, para. 35, the Working Group decided to delete from article 2 the definition of "responsive tender" set forth in subparagraph (j), subject to a review of the Model Law by the Secretariat to confirm that the use of that term was essentially limited to article 28. The review of the Model Law shows that to be the case. Pursuant to a suggestion by the Working Group, the substance of the definition has been incorporated in article 28 (1 bis) (a). On a separate point, the Working Group may wish to consider adding a definition of "procurement contract" as "a contract between the procuring entity and the contractor resulting from the procurement proceedings".

* * *

Article 3. [moved to preamble]

* * *

Article 3 bis. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) treaty or other form of agreement to which it is a party with one or more other States,

(b) agreement with an intergovernmental international financing institution that is entered into by this State,

((c) agreements between the federal government of [name of federal State] and [subdivisions of the federal State],) */ 1/

the requirements of the treaty or agreement shall prevail; 2/ but in all other respects, the procurement shall be governed by this Law.

---

*/ In the case of enactment by the government of a federal State, the preceding language within parentheses may be incorporated so as to give precedence to agreements concluded between the government of the federal State and subdivisions of the federal State relating to matters covered by the Model Law.

Notes

1. The language within parentheses in subparagraph (c) has been added pursuant to the decision in A/CN.9/359, para. 37, to allow federal States enacting the Model Law to also give precedence to agreements between the federal government and subdivisions of the federal State. The title has been modified accordingly. The Working Group may wish to consider adding to the text of the Model Law an explanatory footnote along the lines of the one included herein. Further guidance could be provided in the commentary, for example, that such language might be particularly useful in the case of enactment by a federal State in which the national government did not possess the power to legislate for its subdivisions with respect to matters covered by the Model Law. The title of the article has been simplified, as well as modified to reflect the addition of the optional clause for federal States. The article has been broken down into subparagraphs for the purposes of clearer presentation.

2. See A/CN.9/359, para. 38.

* * *

Article 4. Procurement regulations

The . . . (each State enacting this Model Law specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law. 1/

Note

1. See A/CN.9/359, para. 40.

* * *

Article 5. Public accessibility of procurement law, procurement regulations and other legal texts relating to procurement

This Law and the procurement regulations, all administrative rulings and directives of general application in connection with procurement covered by this Law, and all amendments thereof, shall be promptly made accessible to the public.

* * *

Article 6. [deleted] 1/

Note

1. See A/CN.9/343, para. 66.

* * *

Article 7. Methods of procurement

(1) Except as otherwise provided by this Law, a procuring entity engaging in procurement shall do so only by means of tendering proceedings. 1/

(new 2) The procuring entity may engage in procurement by means of 2/

(a) two-stage tendering, where the conditions in new article 33 bis are satisfied; 3/

(b) request for proposals, where the conditions in article 33 ter are satisfied;

(c) competitive negotiation, where the conditions in new article 34 are satisfied;

(d) request for quotations, where the conditions in new article 34 bis are satisfied;

(e) single source procurement, where the conditions in article 35 are satisfied.

(new 3) When, in accordance with this Law, the circumstances of a particular procurement fit the conditions for use of more than one of the methods referred to in paragraph (new 2), the selection of the method to be used shall be made on the basis of an order of preference corresponding to the order in which the methods are set forth in paragraph (new 2). 4/

(4) [deleted] 5/

(5) A procuring entity that uses a method of procurement other than tendering proceedings pursuant to paragraph (new 2) or (new 3) shall include in the record required under article 10 ter a statement of the grounds and circumstances on which it relied to justify the use of that method of procurement. 6/

Notes

1. Pursuant to A/CN.9/359, para. 50, the word "only" has been added to give additional emphasis to the general rule that tendering proceedings are to be engaged for all procurement, subject only to the exceptions provided for in the Model Law.

2. As reported in A/CN.9/359, para. 48, the Working Group decided that the Model Law should not recommend that enacting States should necessarily incorporate each of the methods of procurement other than tendering listed in paragraph (2), though such a possibility would not be excluded. This decision stemmed in particular from a recognition that there was a degree of overlap in the conditions for use of two-stage tendering, request for proposals and competitive negotiation in that at least one of the conditions for use of each of those methods referred to cases in which the procuring entity, for one reason or another, was unable to formulate specifications to the degree of completion necessary for engaging in tendering proceedings (see new article 33 bis (a) and (b), article 33 ter (a) and new article 34 (a), respectively). It

was noted that that overlap reflected the fact that the practice differed from country to country as to which of those methods was used in cases of incomplete specifications. In this light, the Working Group decided (see A/CN.9/359, para. 198) that those three methods should be treated as equal options as regards cases in which the procuring entity was unable to formulate complete specifications and that it would review the question of overlap further at the present session, including the order of preference provided in paragraph (new 3). In considering the matter further, the Working Group may wish to consider the exact manner in which to implement the equality of the three methods in question (in this regard, see note 1 under new article 33 bis) and to focus on the following questions that arise from the decision to treat the three methods as interchangeable for cases of incomplete specifications:

(a) Should the Model Law recommend the incorporation of a minimum number of methods other than tendering? The Working Group may wish to consider further a proposal made at the last session, but not accepted at that time, that the Model Law should recommend a particular structure in the choice of methods of procurement other than tendering, for example, that enacting States should incorporate at least one of two-stage tendering, request for proposals or competitive negotiation (see A/CN.9/360, para. 48). Without such an approach, the inference might be drawn that cases in which tendering was an unsuitable method could be dealt with simply through single source procurement. It should also be borne in mind that the problem of overlap principally concerned two-stage tendering, request for proposals and competitive negotiation, and did not affect request for quotations or single source procurement.

(b) Should the Model Law recommend that competitive negotiation should be incorporated, if not for the case of incomplete specifications, at least for the cases covered in new article 34 (b), (c) (d) and (e) ? As a result of the decision to leave the choice of methods of procurement other than tendering optional, an enacting State that did not incorporate competitive negotiation would be left with no method of procurement tailored to meet two types of circumstances currently only covered by competitive negotiation, namely, urgency not related to catastrophic events (new article 34 (b)) and failed tendering proceedings (new article 34 (e)). Furthermore, for procurement involving research (new article 34 (c)) and national defence or national security (new article 34 (d)), the only remaining option presumably would be single source procurement. A solution might be to provide that a State that incorporated two-stage tendering or request for proposals, but not competitive negotiation, as the method to be used in cases in which the procuring entity was unable to formulate complete specifications, would nevertheless incorporate competitive negotiation for the cases covered in subparagraphs (b), (c), (d) and (e) of new article 34. Such an approach would be in line with the Working Group's decision that those three methods should be interchgangeable with respect to cases in which the procuring entity was unable to formulate complete specifications, while at the same time limiting resort to single source procurement, the least competitive of all the methods (see also note 1 under new article 33 bis).

(c) If two-stage tendering, request for proposals and competitive negotiation are treated as equal options for cases of incomplete specifications, is it necessary to retain the order of preference in paragraph (new 3) ? In view of the fact that the problem of overlap among conditions for use of methods of procurement other than tendering principally concerned

conditions for use that related to cases of incomplete specifications and that were found in the provisions governing two-stage tendering, request for proposals and competitive negotiation, the decision to treat those methods as equal options would appear to remove the need which the order of preference was designed to meet. Removal of the order of preference would also solve the problem, referred to in A/CN.9/359, para. 197, that would occur were an enacting State to incorporate more than one of those methods for cases of incomplete specifications. Were an enacting State to incorporate, for example, both two-stage tendering and competitive negotiation, the order of preference would always compel the use of two-stage tendering for cases of incomplete specifications. Removal of the order of preference would allow the procuring entity to select the method it felt to be most appropriate in such cases. As indicated in A/CN.9/359, para. 50, in order to guide States in selecting the method or methods to be incorporated for cases of incomplete specifications, the commentary could indicate which methods were preferable from the standpoint of transparency and competition.

(d) How should the overlap between competitive negotiation and single-source procurement with respect to research contracts be dealt with? The conditions for use of both competitive negotiation and single-source procurement refer to research contracts (new article 34(c) and article 35(e)). In view of the order of preference in article 7(3), a State incorporating both competitive negotiation and single-source procurement would, in effect, always be precluded from ever using single source procurement for research contracts. The solution might lie in restricting article 35(e) to cases of urgency. A similar overlap with respect to national defence or national security (new article 34(d) and article 35(f)) would appear to pose less of a problem since a procuring entity would be free to waive application of the order of preference pursuant to article 1(2).

3. See A/CN.9/359, para. 52.

4. See note 2 concerning the decision of the Working Group to consider paragraph (new 3) further at the present session.

5. See A/CN.9/356, paras. 117 and 146.

6. See A/CN.9/359, para. 54.

* * *

Article 8. Qualifications of contractors and suppliers

(new 1) This article applies to the ascertainment by the procuring entity of the qualifications of contractors and suppliers at any stage of the procurement proceedings.

(1) Subject to the right of contractors and suppliers to protect their intellectual property or trade secrets, the procuring entity may:

(a) require contractors and suppliers participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the contractors and suppliers:

(new i) possess the technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, and reputation, and the personnel, to perform the procurement contract;

(i) have legal capacity to enter into the procurement contract;

(ii) are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing; 1/

(iii) have fulfilled their obligations to pay taxes and social security contributions in this State;

(iv) have not, and their principals or officers have not, 2/ been convicted of any criminal offense, related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of [... years (the State enacting this Law specifies a period of time)] 2/ preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings; 3/

(v) [deleted] 4/

(b) [deleted] 5/

(2) Any requirement established pursuant to paragraph (1)(a) shall be set forth in the prequalification documents, if any, and in the solicitation documents and shall apply equally to all contractors and suppliers. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers other than those provided for in paragraph (1)(a).

(2 bis) The procuring entity shall evaluate the qualifications of contractors and suppliers in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, 6/ and the solicitation documents.

(2 ter) Subject to articles 8 ter (1) and 28(7)(e), the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of contractors and suppliers that discriminates against or among contractors and suppliers or against categories thereof on the basis of nationality.

(2 quater) The procuring entity may disqualify a contractor or supplier if it finds at any time that the information submitted concerning the qualifications of the contractor or supplier was false or inaccurate. 7/

(3) Except where prequalification proceedings have taken place, a contractor or supplier that claims to meet the qualification criteria shall not be precluded from participating in procurement proceedings for the reason that it has not provided proof that it is qualified pursuant to paragraph (1) if the contractor or supplier undertakes to provide such proof prior to the

commencement of the examination of tenders, proposals or offers, as the case may be, 8/ and if it is reasonable to expect that the contractor or supplier will be able to do so.

Notes

1. The Working Group may wish to consider whether it is necessary to retain subparagraph (ii) since subparagraph (new i) authorizes the procuring entity to require contractors and suppliers to produce evidence deemed by the procuring entity necessary to show that contractors and suppliers have sufficient financial resources.

2. See A/CN.9/359, para. 58.

3. See A/CN.9/359, para. 59.

4. See A/CN.9/331, para. 50.

5. See note 6 to this provision in A/CN.9/WG.V/WP.30.

6. See A/CN.9/359, para. 61.

7. Paragraph (2 quater) has been added to implement the decision in A/CN.9/359, para. 75, that the procuring entity should be empowered to disqualify contractors and suppliers that submitted false or inaccurate information concerning their qualifications. A similar provision, geared to the specific cases of prequalification and reconfirmation proceedings, has been added to article 8 bis (6).

8. See A/CN.9/359, para. 63. The Working Group might wish to consider further the question of when the cut-off time should be for contractors and suppliers under this provision to present proof of qualifications. The reference to commencement of examination of tenders, proposals or offers appears to be vague and may give rise to disputes. It might provide less certainty, as well as less time for the presentation of proof of qualifications, than did the reference to the conclusion of the procurement proceedings which appeared in the earlier version.

* * *

Article 8 bis. Prequalification proceedings

(1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the submission of tenders, proposals or offers 1/ in procurement proceedings conducted pursuant to chapters II or III, contractors and suppliers that are qualified. The provisions of article 8 shall apply to prequalification proceedings.

(2) If the procuring entity engages in prequalification proceedings, it shall provide a set of prequalification documents to each contractor and supplier that requests them in accordance with the procedures specified in the invitation to prequalify and that pays the price, if any, charged for those documents.

(3) The prequalification documents shall include, at a minimum, the information required to be specified in the invitation to tender by article 14(1), except subparagraphs (e), (f) and (g) thereof, as well as the following information 2/ :

(a) instructions for preparing and submitting prequalification applications;

(b) [deleted] 3/

(c) a summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings;

(d) any documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;

(e) the procedures to be used for evaluating the qualifications of contractors and suppliers;

(f) the manner and place for the submission of applications to prequalify and the deadline for the submission, expressed as a specific date and time and allowing sufficient time for contractors and suppliers to prepare and submit their applications, taking into account the reasonable needs of the procuring entity;

(g) any other requirements that may be 2/ established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of applications to prequalify and to the prequalification proceedings.

(3 bis) The procuring entity shall respond to any request by a contractor or supplier for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of applications to prequalify. The response by the procuring entity, which shall not identify the source of the request, shall be given within a reasonable time so as 4/ to enable the contractor or supplier to make a timely submission of its application to prequalify and shall be communicated to all contractors and suppliers to which the procuring entity provided the prequalification documents.

(3 ter) [incorporated in article 9 bis] 5/

(4) The procuring entity shall make a decision with respect to the qualifications of each contractor or supplier submitting an application to prequalify. That decision shall be based soley on the criteria set forth in the prequalification documents. 6/

(4 bis) The procuring entity shall promptly notify each contractor and supplier submitting an application to prequalify whether or not it has been prequalified and shall make available to any member of the general public, upon request, 6/ the names of all contractors and suppliers that have been prequalified. Only contractors and suppliers that have been prequalified are entitled to participate further in the procurement proceedings.

(5) The procuring entity shall upon request communicate to contractors and suppliers that have not been prequalified the grounds therefore, but the procuring entity is not required to specify the evidence or give the reasons for its finding that those grounds were present.

(6) The procuring entity may require a contractor or supplier that has been prequalified to reconfirm its qualifications in accordance with the same criteria utilized to prequalify such contractor or supplier. The procuring entity shall disqualify any contractor and supplier that fails to reconfirm its qualifications if requested to do so and may disqualify a contractor or supplier if it finds at any time that the prequalification or reconfirmation information submitted was false or inaccurate. The procuring entity shall promptly notify each contractor and supplier requested to reconfirm its qualifications as to whether or not the contractor or supplier has succeeded in reconfirming its qualifications. 7/

Notes

1. The reference to offers has been added so as to clearly encompass competitive negotiation.

2. See A/CN.9/359, paras. 66 and 67.

3. See A/CN.9/343, para. 149.

4. See A/CN.9/359, para. 68.

5. See A/CN.9/359, para. 69.

6. Pursuant to A/CN.9/359, paras. 70 and 71, subparagraph (a) has been added and the remainder of paragraph (4) has been placed in paragraph (4 bis) and modified as agreed upon.

7. See A/CN.9/359, paras. 75 to 79.

* * *

Article 8 ter. Participation by contractors and suppliers 1/

(1) Contractors and suppliers are permitted to participate in procurement proceedings without regard to nationality, except in cases in which,

(a) on the grounds of economy and efficiency, the procuring entity decides to permit participation only by domestic contractors and suppliers, or

(b) on grounds specified in the procurement regulations or in other provisions of law, the procuring entity decides to limit participation in procurement proceedings on the basis of nationality. 2/

(new 1 bis) A procuring entity that restricts participation on the basis of nationality pursuant to either paragraph (1) (a) or paragraph (1) (b) shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied. 3/

(1 bis) In procurement proceedings in which participation is limited to domestic contractors and suppliers pursuant to paragraph (1)(a), the procuring entity shall not be required to employ the procedures set forth in articles 8(2 ter), 12(1 bis), 14(1)(f bis), 14(1)(g), 14(2)(b bis), 14(2)(c), 17(2)(i bis), 17(2)(k), 17(2)(q), 20(4), and 26(1)(b) of this Law. 4/

(2) [deleted] 5/

(3) The procuring entity, when first soliciting the participation of contractors or suppliers in the procurement proceedings, shall declare to them that they may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered, or shall declare to them that participation is limited on the basis of nationality, as the case may be. 3/

Notes

1. The provisions on participation by contractors and suppliers, which formerly appeared in article 11, have been relocated to Chapter I pursuant to A/CN.9/359, para. 94.

2. Paragraph (1) has been restructured and slightly reformulated pursuant to A/CN.9/359, para. 95. The Working Group may wish to consider whether it is desirable to retain the reference in subparagraph (b) to the procurement regulations as a source of authority for restriction of participation on the basis of nationality. Without any standard or limitation in the Model Law as to what the procurement regulations may provide as to nationality-based restrictions, the provision may be seen as detrimental to the objectives of the Model Law.

3. See A/CN.9/359, para. 96. The Working Group may wish to consider further whether the foregoing provision is necessary in view of the fact that the situation to which it relates is most particularly the case of tendering proceedings in which participation is neither restricted to domestic contractors or suppliers, nor otherwise restricted on the basis of nationality. For such cases, it might be provided, in line with paragraph (1), that the tendering proceedings are deemed open to all nationalities unless otherwise provided in the solicitation documents. The notion of requiring a declaration such as that presently called for in paragraph (3) would appear to have little if any relevance to methods of procurement in which the procuring entity seeks out specific contractors and suppliers in order to solicit their participation in the procurement proceedings, which is typically the case in all of the procurement methods other than tendering and two-stage tendering.

4. As reported in A/CN.9/359, para. para. 98, it was agreed that paragraph (1 bis) should make it clear that, while the procuring entity was permitted to forego the application of certain procedures in wholly domestic procurement, the procuring entity was not precluded from applying in such procurement whichever of those procedures it felt were appropriate. It would appear that the words "shall not be required to employ the procedures" make it sufficiently clear that the procuring entity is not prohibited from applying any of the measures in question.

5. See A/CN.9/331, para. 58.

* * *

Article 9. [Merged with article 8]

* * *

Article 9 bis. Form of communications 1/

(1) Documents, notifications, decisions and other communications referred to in this Law to be submitted by the procuring entity or administrative authority to a contractor or supplier or by a contractor or supplier to the procuring entity shall be in written form, including in any form that provides a record of the content of the communication.

(2) Notwithstanding subparagraph (a), communications between contractors and suppliers and the procuring entity referred to in articles 8 bis(3 bis) and (4)(b), 12(2)(a), 22(3), 25(2)(a), 26(1)(b bis), 28(1), 29(3) and 32(1) may be made by telephone or any other means of communication that does not provide a record of the content of the communication provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form which provides a record of the confirmation. 2/

(3) The procuring entity shall not discriminate against or among contractors or suppliers on the basis of the form in which they transmit or receive documents, notifications, decisions or other communications.

Note

1. Article 9 bis contains a reformulated version of article 10 bis, which had been presented to the Working Group in the annex to document A/CN.9/WG.V/WP.33. The provision has been relocated as it appeared to the Secretariat to be more appropriate that the Model Law deal with general rules concerning formal requirements for certain communications between the procuring entity and contractors and suppliers prior to dealing with the specific issue of legalization addressed in article 10. The substance of the present article has been reformulated to implement the decision in A/CN.9/359, para. 107 that the Model Law should go beyond what had been done in article 10 bis and should contain a general provision enabling enacting States to permit the use of electronic data interchange (EDI) in procurement proceedings in place of traditionally paper-based documentation. Paragraph (1) is intended to permit the use of EDI while taking into account the concerns raised in A/CN.9/343, para. 207, concerning the use of EDI for the submission of tenders, as well as the concerns referred to in A/CN.9/359, para. 107, that a provision permitting the use of EDI should take into account that the procedures in the Model Law generally reflect practices which have been traditionally paper-based and that the availability of EDI was not uniform. This is done by way of the rule that documents, notifications, decisions and communications are to be in writing, with the parallel possibility of EDI transmissions. Paragraph (3) further addresses the above-mentioned concerns by providing that contractors and suppliers to whom EDI is not available are not to be discriminated against in the procurement proceedings by virtue of that fact. Paragraph (1) also permits the use of EDI for the transmission of

tenders in non-paper form, something which is apparently beginning to be done in some countries. Such a possibility, while consistent with the decision at the fourteenth session (A/CN.9/359, para. 107) that the use of EDI generally should be permitted, would appear to be inconsistent with the decision at the twelfth session (A/CN.9/343, para. 207) not to permit the use of forms other than writing for the submission of tenders, a decision which was recalled in A/CN.9/359, para. 107. A provision has been added to article 24 (4) intended to ensure that an EDI submission of a tender would involve the use of EDI techniques designed to prevent access by the procuring entity or any one else to the contents of the EDI transmission, thereby providing the functional equivalent of the sealed envelope used when the tender is in written form (e.g., by the use of software that prevents the procuring entity from gaining access to the tenders until after the deadline and placement of relevant computer equipment in a secure location beyond the reach of the procuring entity).

At the fourteenth session, the question was raised as to whether the concept of "record" would be universally recognized as an appropriate element in a statutory formula intended to permit the use of EDI functional equivalents as a replacement for paper-based documentation. The Secretariat was requested to review article 10 bis in the light of that question and of the Commission's ongoing activities in the EDI field. In the intervening period, the Working Group on International Payments held its twenty-fourth session (Vienna, 27 January to 7 February 1992), which was devoted to a discussion of possible issues of a legal framework for the use of EDI and included a discussion of differing approaches that might be used to remove obstacles posed to the use of EDI by writing requirements found in existing law. It was noted that the notion of providing a "record" of information was a key function of a written document that would have to be fulfilled for any electronic equivalent of a written document to be considered as a suitable replacement. In addition, it was pointed out that parties would be free to agree on electronic equivalents for other functions served by paper documents including unalterability, legibility, reproduceability, ability to be authenticated, and acceptability in terms of form to public authorities and courts. The Working Group also took the view that, rather than attempting to deal with existing writing requirements that posed obstacles to the use of EDI by attempting to eliminate writing requirements across the board, it would be preferable to expand the definition of "writing" so as to encompass EDI techniques that provide functional equivalents to paper-based documentation (see A/CN.9/360, paras. 32 to 43, concerning the discussion by the Working Group on International Payments on the question of writing requirements). The present reformulation of article 10 bis is intended to be in line with that approach discussed by the Working Group on International Payments. The approach currently taken in article 9 bis permits the further consolidation of provisions on formal requirements previously scattered throughout the Model Law, beyond what had been done in article 10 bis, thereby obviating the need for repeated references to writing requirements and for a separate provision defining "writing". Lastly, it should be noted that the title as it appeared over article 10 bis has been modified with a view to reflecting more precisely the content of the present article and so as to avoid suggesting that the present article deals with negotations between the procuring entity and contractors and suppliers.

2. Paragraph (2) contains the totality of the text that formerly appeared in article 10 bis. The reference to article 12 (2) (a) has been added pursuant

to A/CN.9/359, para. 83; the reference to article 8 bis (4) has been added at the initiative of the Secretariat. The basis for the elaboration of the reference to telephone communication is found in a remark reported in A/CN.9/359, para. 82.

* * *

Article 10. Rules concerning documentary evidence provided by contractors and suppliers

(1) When the procuring entity requires the legalization of documentary evidence provided by contractors and suppliers to demonstrate their qualifications in procurement proceedings, the procuring entity may 1/ not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(2) [deleted] 2/

(3) [deleted] 2/

Note

1. The word "may" replaces the word "shall" so as to make it clearer that the procuring entity is not obligated to require legalization of documentary evidence.

2. See A/CN.9/343, para. 113.

* * *

Article 10 bis [moved to article 9 bis]

* * *

Article 10 ter. Record of procurement proceedings

(1) The procuring entity shall prepare a record of the procurement proceedings containing the following information:

(a) a brief description of the goods or construction to be procured, or of the procurement need for which the procuring entity requested proposals or offers; 1/

(b) the names and addresses of contractors and suppliers that submitted tenders, proposals, offers or quotations;

(c) information relative to the qualifications, or lack thereof, of contractors and suppliers that submitted tenders, proposals, offers or quotations;

(d) the price and a summary of the other principal terms and conditions of each tender, proposal, offer or quotation and of the procurement contract;

(e) a summary of the evaluation and comparison of tenders, proposals, offers or quotations;

(f) if all tenders were rejected pursuant to article 29, a statement to that effect and the grounds therefore, in accordance with article 29(1);

(new f bis) if, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the grounds therefor; 2/

(f bis) the information required by article 10 quater, if a tender, proposal, offer or quotation was rejected pursuant to that provision; 3/

(f ter) in tendering proceedings in which the procuring entity sends invitations to tender or to prequalify only to particular contractors or suppliers pursuant to article 12(2)(a), the statement required under article 12(2)(c); 4/

(g) in procurement proceedings involving methods of procurement other than tendering, the statement required under article 7(5) of the grounds and circumstances on which the procuring entity relied to justify the selection of the method of procurement used;

(h) in procurement proceedings in which the procuring entity, in accordance with article 8 ter(1), restricts participation to domestic contractors and suppliers, a statement of the grounds relied upon by the procuring entity for imposing the restriction. 5/

(2) The portion of the record referred to in subparagraphs (a) and (b) of paragraph (1) shall be made available for inspection by any person after a tender, proposal, offer or quotation, as the case may be, has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract. 6/

(2 bis) The portion of the record referred to in subparagraphs (c) to (new f bis) of paragraph (1) shall be made available for inspection by contractors or suppliers that submitted tenders, proposals or quotations, or applied for prequalification, but before a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court. 7/ However, except when ordered to do so by a competent court, and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition;

(b) information relating to the examination, evaluation and comparison of tenders, proposals, offers or quotations, and tender, proposal, offer or quotation prices.

(2 ter) The portion of the record referred to in subparagraph (f bis) of paragraph (1) shall be made available for inspection by the contractor or

supplier alleged to have offered the inducement, but not until after a tender, proposal, offer or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract, unless disclosure at an earlier stage is ordered by a competent court. 3/

(3) [deleted] 8/

(4) The procuring entity shall not be liable to contractors and suppliers for monetary damages solely as as result of a failure to prepare a record of the procurement proceedings in accordance with the present article. 9/

Notes

1. The reference to "offers" has been added here and at other points in article 10 ter in accordance with A/CN.9/359, para. 85.

2. The contents of the foregoing provision formerly were a part of subparagraph (f).

3. The substance of subparagraph (f bis), which formerly appeared in subparagraph (f), has been placed in a separate provision in order to facilitate implementation of the decision in A/CN.9/359, para. 91; the companion provision in paragraph (2 ter) has been added for the same purpose.

4. See A/CN.9/359, para. 101. It may be noted that this new element has been placed in a portion of the record for which the Model Law provides no disclosure requirement. The Working Group may wish to consider the appropriateness of this approach.

5. See A/CN.9/359, para. 86.

6. The Working Group may wish to consider further the desirability of retaining in their present form the provisions in paragraphs (2) and (3) concerning disclosure of the contents of the record. It might be considered that those provisions unduely complicate the Model Law and might diminish the degree of public accountability and transparency achieved by the Model Law by limiting the extent of disclosure.

7. See A/CN.9/359, para. 88.

8. See A/CN.9/359, para. 89.

9. See A/CN.9/359, para. 90.

* * *

Article 10 quater. Inducements from contractors and suppliers

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity shall reject a tender, proposal, offer or quotation if the contractor or supplier that submitted it offers, gives or agrees to give to any current or former officer or employee of the procuring entity a gratuity, whether or not in the form of money, an offer of employment or any other thing or service of value, as an inducement with respect to an

act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. The rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings, disclosure of which shall be limited in accordance with article 10 ter(2 ter). 1/

Note

1. See A/CN.9/359, para. 91.

* * *

CHAPTER II. TENDERING PROCEEDINGS

SECTION I.

Article 11. [moved to article 8 ter]

* * *

SECTION II. SOLICITATION OF TENDERS AND OF APPLICATIONS TO PREQUALIFY

Article 12. Solicitation of tenders and of applications to prequalify

(1) A procuring entity shall solicit tenders, or, where applicable, applications to prequalify, from all interested contractors and suppliers by causing an invitation to tender or an invitation to prequalify, as the case may be, to be published in . . .(each State enacting this Model Law specifies the official gazette or other official publication in which the notice of proposed procurement is to be published).

(1 bis) The invitation to tender or invitation to prequalify shall also be published, in a language customarily used in international trade, at a minimum in one newspaper of wide international circulation or relevant trade publication or technical journal of wide international circulation.

(2) (a) Notwithstanding the provisions of paragraph (1) and (1 bis), the procuring entity may, when necessary for reasons of economy and efficiency, (and subject to approval by . . . (each State may designate an organ to issue the approval),) solicit tenders, or, where applicable, applications to prequalify, by sending invitations to tender or invitations to prequalify, as the case may be, only to particular contractors or suppliers selected by it. The procuring entity shall select a sufficient number of contractors and suppliers to ensure effective competition, consistent with the efficient conduct of the tendering proceedings. 1/

(b) [incorporated in article 9 bis (1) and (2)] 2/

(c) A procuring entity that makes use of the procedure provided for in subparagraph (a) shall include in the record of the procurement proceedings a statement of the grounds and circumstances on which it relied for doing so. 3/

Notes

1. The references to prequalification have been added in order to cure unintended inconsistencies that remained after the term "notice of proposed procurement" was replaced at earlier stages of the development of the Model Law. See also A/CN.9/359, para. 102.

2. See A/CN.9/359, paras. 83 and 103.

3. See A/CN.9/359, para. 101.

* * *

Article 13. [Deleted] 1/

Note

1. See A/CN.9/331, para. 62.

* * *

Article 14. Contents of invitation to tender and invitation to prequalify

(1) The invitation to tender shall contain at least the following information:

(a) the name and address of the procuring entity;

(b) the nature and quantity of the goods to be supplied or the nature and location of the construction to be effected;

(c) the desired or required time for the supply of the goods or for the completion of the construction;

(d) the criteria to be used for evaluating the qualifications of contractors and suppliers, in conformity with article 8(1)(a);

(d bis) a declaration, which may not later be altered, that contractors and suppliers may participate in the procurement proceedings regardless of nationality, or a declaration that participation is limited on the basis of nationality, as the case may be;

(e) the means of obtaining the solicitation documents and the place from which they may be obtained;

(f) the price, if any, charged by the procuring entity for the solicitation documents;

(f bis) the currency and means of payment for the solicitation documents;

(g) the language or languages in which the solicitation documents are available;

(h) the place and deadline for the submission of tenders;

(i) [deleted] 1/

(j) [deleted] 1/

(2) An invitation to prequalify need not contain the information referred to in paragraph (1)(e), (g) and (h), but shall contain the other information referred to in paragraph (1), as well as the following information:

(a) the means of obtaining the prequalification documents and the place from which they may be obtained;

(b) the price, if any, charged by the procuring entity for the prequalification documents;

(b bis) the currency and terms of payment for the prequalification documents;

(c) the language or languages in which the prequalification documents are available; and

(d) the place and deadline for the submission of applications to prequalify.

Note

1. See A/CN.9/343, para. 133.

* * *

Article 15. [merged with article 8]

* * *

SECTION III.

Article 16. [moved to article 8 bis]

* * *

SECTION IV. [heading deleted] 1/

Note

1. In order to simplify the structure of the Model Law, the heading that appeared as Section IV, "Solicitation documents", has been deleted.

* * *

Article 17. Solicitation documents

(1) The procuring entity shall provide the solicitation documents to contractors and suppliers in accordance with the procedures and requirements

specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each contractor and supplier that has been prequalified and that pays the price, if any, charged for those documents.

(2) The solicitation documents shall include, at a minimum, 1/ the following information:

(a) instructions for preparing tenders;

(b) the criteria and procedures, in conformity with the provisions of article 8, relative to the evaluation of the qualifications of contractors and suppliers and relative to the re-confirmation of qualifications pursuant to article 28(8 bis);

(c) [merged with subparagraph (b)]

(d) the requirements as to documentary evidence or other information that must be submitted by contractors and suppliers to demonstrate their qualifications;

(e) the nature and required technical and quality characteristics, in conformity with article 20, of the goods or construction to be procured, including, but not limited to, technical specifications, plans, drawings and designs as appropriate; the quantity of the goods; the location where the construction is to be effected; any incidental services to be performed; 2/ and the desired or required time, if any, when the goods are to be delivered or the construction is to be effected;

(e bis) the factors to be used by the procuring entity in determining the successful tender, including any factors other than price to be used pursuant to article 28(7)(c) and (d) and the relative weight of such factors; 3/

(f) to the extent they are already known to the procuring entity, 4/ the terms and conditions of the procurement contract and the contract form, if any, to be signed by the parties;

(g) if alternatives to the characteristics of the goods, construction, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect;

(h) if contractors and suppliers are permitted to submit tenders for only a portion of the goods or construction to be procured, a description of the portion or portions for which tenders may be submitted;

(i) the manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the goods or construction themselves, such as transportation and insurance charges, customs duties and taxes; 5/

(i bis) the currency or currencies in which the tender price is to be formulated and expressed;

(j) [deleted] 6/

(k) the language or languages, in conformity with article 23, in which tenders are to be prepared;

(l) any requirements of the procuring entity with respect to the nature, form, amount and other principal terms and conditions, and issuing institution or entity of any tender security to be provided by contractors and suppliers submitting tenders, and any such requirements for any security for the performance of the procurement contract to be provided by the contractor or supplier that enters into the procurement contract, including securities such as labour and materials bonds; 7/

(m) the manner, place and deadline for the submission of tenders, in conformity with article 24;

(n) the means by which, pursuant to article 22, contractors and suppliers may seek clarifications of the solicitation documents and a statement as to whether the procuring entity intends to convene a meeting of contractors and suppliers;

(n bis) [deleted] 8/

(o) the period of time during which tenders shall be in effect, in conformity with article 25;

(p) the place, date and time for the opening of tenders, in conformity with article 27;

(p bis) the procedures to be followed for opening and examining tenders; 9/

(q) the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article 28(8) and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(r) [moved to subparagraph (y bis)]

(s) references to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, provided, however, that the omission of any such reference shall not constitute grounds for review under article 36 or give rise to liability on the part of the procuring entity;

(t) the name(s), functional title(s) and address(es) of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from contractors and suppliers in connection with the procurement proceedings, without the intervention of an intermediary;

(u) any commitments to be made by the contractor or supplier outside of the procurement contract, such as commitments relating to countertrade or to the transfer of technology;

(v) [deleted] 10/

(w) notice of the right provided under article 36 of this Law to seek review of an unlawful act or decision of, or procedure followed by, the procuring entity in relation to the procurement proceedings; 11/

(x) if the procuring entity reserves the right to reject all tenders pursuant to article 29, a statement to that effect;

(y) any formalities that will be required once a tender has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article 32, and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval. 12/

(y bis) any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and submission of tenders and to other aspects of the procurement proceedings. 13/

Notes

1. See A/CN.9/359, para. 108; this solution is analogous to that used in article 8 bis (3) (see note 2 under that article).

2. See A/CN.9/359, para. 109.

3. See A/CN.9/359, para. 110.

4. See A/CN.9/359, para. 111.

5. See A/CN.9/359, para. 112.

6. See A/CN.9/343, para. 168.

7. See A/CN.9/359, para. 113.

8. See A/CN.9/343, para. 198.

9. See A/CN.9/359, para. 114. The foregoing provision formerly appeared in subparagraph (p); the reference to the procedures and criteria for evaluation and comparison of tenders has been deleted as the point is already covered in subparagraph (e bis).

10. See A/CN.9/343, para. 185.

11. See A/CN.9/359, para. 116.

12. See A/CN.9/359, para. 117.

13. The content of subparagraph (y bis) formerly appeared in subparagraph (r); concerning this move, and the slight drafting change, see A/CN.9/359, para. 115.

* * *

Article 18. [merged with article 17]

* * *

Article 19. Charge for solicitation documents

The procuring entity may charge contractors and suppliers a sum for solicitation documents. The sum shall reflect only the cost of printing the solicitation documents and providing them to contractors and suppliers.

* * *

Article 20. Rules concerning description of goods or construction in prequalification documents and solicitation documents; language of prequalification documents and solicitation documents

(1) Specifications, plans, drawings and designs setting forth the technical or quality characteristics of the goods or construction to be procured, and requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology, that create 1/ obstacles to participation by contractors or suppliers in the procurement proceedings shall not be included or used in the prequalification documents or in the solicitation documents.

(1 bis) Specifications, plans, drawings, designs, requirements, symbols or terminology shall not be included or used with a view to, or having the effect of, creating obstacles to participation of contractors and suppliers because of nationality. 2/

(2) To the extent possible, specifications, plans, drawings, designs and requirements shall be based on the relevant objective technical and quality characteristics of the goods or construction to be procured. There shall be no requirement of or reference to a particular trade mark, name, patent, design, type, specific origin or producer unless there is no other sufficiently precise or intelligible way of describing the characteristics of the goods or construction to be procured and provided that words such as "or equivalent" are included.

(3) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the goods or construction to be procured shall be used, where available, in formulating the specifications, plans, drawings and designs to be included in the prequalification documents and in the solicitation documents.

(b) Standardized trade terms shall be used, where available, in formulating the terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings and in formulating other relevant aspects of the prequalification documents and of the solicitation documents.

(c) [deleted] 3/

(4) The prequalification documents and the solicitation documents shall be formulated in . . . (each State enacting this Model Law specifies its official

language or languages) (and in a language customarily used in international trade).

Notes

1. See A/CN.9/359, para. 120.

2. See A/CN.9/359, para. 122, as well as note 2 under article 20 in A/CN.9/WG.V/WP/30.

3. See A/CN.9/331, para. 108.

* * *

Article 21. [deleted] 1/

Note

1. See A/CN.9/331, para. 114.

* * *

Article 22. Clarifications and modifications of solicitation documents

(1) A contractor or supplier may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a contractor or supplier for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for the submission of tenders. The procuring entity shall respond within a reasonable time so as to enable the contractor or supplier to make a timely submission of its tender and shall, without identifying the source of the request, communicate the response to all contractors and suppliers to which the procuring entity has sent the solicitation documents. 1/

(2) At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether at its own initiative or in response to a clarification requested by a contractor or supplier, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all contractors and suppliers to which the procuring entity has sent the solicitation documents and shall be binding on those contractors and suppliers.

(3) [incorporated in article 9 bis] 2/

(4) If the procuring entity convenes a meeting of contractors and suppliers, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all contractors and suppliers to which the procuring entity provided the solicitation documents, so as to enable those contractors and suppliers to take the minutes into account in preparing their tenders. 3/

Notes

1. See A/CN.9/359, para. 125.

2. See A/CN.9/359, para. 127.

3. See A/CN.9/359, para. 128.

* * *

SECTION V. SUBMISSION OF TENDERS 1/

Note

1. The section heading has been modified.

* * *

Article 23. Language of tenders

Tenders may be formulated and submitted in any language in which the solicitation documents have been issued or in any other language which the procuring entity specifies in the solicitation documents.

* * *

Article 24. Submission of tenders

(1) The procuring entity shall fix a specific date and time as the deadline for the submission of tenders. The deadline shall allow reasonable time for all contractors and suppliers to whom the procuring entity provides the solicitation documents to prepare and submit their tenders and shall take into account the reasonable needs of the procuring entity. 1/

(2) If, pursuant to article 22, the procuring entity issues a clarification or modification of the solicitation documents, or, if a meeting of contractors and suppliers is held, it shall, prior to the deadline for the submission of tenders, extend the deadline if necessary to afford contractors and suppliers reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders. 2/

(2 bis) (a) The procuring entity may, prior to the deadline for the submission of tenders, extend the deadline if it is not possible for one or more contractors or suppliers to submit their tenders by the deadline due to any circumstance beyond their control. 3/

(b) Notice of any extension of the deadline shall be given promptly to each contractor and supplier to which the procuring entity provided the solicitation documents. 4/

(2 ter) [moved to paragraph (2 bis)(b)]

(3) [moved to paragraph (4 bis)] 5/

(4) Tenders shall be submitted in writing and in sealed envelopes. In accordance with article 9 bis, the procuring entity may accept tenders in a form other than writing, provided that measures are taken that prevent disclosure to the procuring entity or to any other person of the content of the tender prior to the deadline for the submission of tenders. The procuring entity shall on request provide to the contractor or supplier a receipt showing the date and time when its tender was received. 6/

(4 bis) A tender received by the procuring entity after the deadline for the submission of tenders shall not be opened and shall be returned to the contractor or supplier that submitted it. 5/

Notes

1. See A/CN.9/359, para. 131. The Working Group may wish to consider the deletion of the second sentence, which might have the unintended effect of giving rise to disputes as to the adequacy of the period of time allowed for preparation of tenders. The matter might be better dealt with in a commentary.

2. See A/CN.9/359, para. 128

3. See A/CN.9/359, para. 133

4. The formal requirements for the notice of the extension of the deadline that formerly appeared in paragraph (2 ter) have been incoporated in article 9 bis. The remainder of paragraph (2 ter) has been moved to paragraph (2 bis) (b).

5. See A/CN.9/359, para. 135.

6. In accordance with A/CN.9/359, paras. 107 and 136, paragraph (4) has been modified to accommodate the use of EDI for transmission of tenders (see note 1 under article 9 bis). The combination of the provisions in articles 9 bis and 24 (4) are intended to address the concerns that the function of the writing requirement found in paragraph (4), in particular to seal the content of the tender, should be fulfilled by any EDI equivalent used when tenders were transmitted in non-written form, and that cognizance should be taken of the fact that EDI was not universally available so as to avoid discrimination against contractors and suppliers that did not possess EDI capabilities (see in this regard article 9 bis (1) and (3)). See also A/CN.9/359, para. 137. On another point, the Working Group may wish to consider adding the word "single" before the words "sealed envelopes".

* * *

Article 25. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents. The period of time shall commence at the deadline for submission of tenders.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request contractors or suppliers to extend the period for an additional specified period of time. A contractor or supplier may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the unextended period of effectiveness. 1/

(b) Contractors and suppliers that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or, if it is not possible to do so, provide new tender securities, to cover the extended period of effectiveness of their tenders. A contractor or supplier whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) A contractor or supplier may modify or withdraw its tender prior to the deadline for the submission of tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for the submission of tenders. 2/

Notes

1. The formal requirements for requests for extensions of the validity period of tenders, and for responses thereto, have been incorporated in article 9 bis.

2. The formal requirements for modifications and withdrawals of tenders have been incorporated in article 9 bis. See also A/CN.9/359, para. 171.

* * *

SECTION VI. [heading deleted] 1/

Note

1. In order to simplify the structure of the Model Law, the heading that appeared as Section VI, "Tender Securities", has been deleted.

* * *

Article 26. Tender securities

(new 1) For the purposes of this Law, "tender security" means a security provided to the procuring entity to secure the obligation of a contractor or supplier submitting a tender to enter into a procurement contract if the contract is awarded to the contractor or supplier, including such arrangements as guarantees, surety bonds, stand-by letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. 1/

(1) When the procuring entity requires contractors and suppliers submitting tenders to provide a tender security:

(a) the requirement shall apply to all such contractors and suppliers;

(a bis) the solicitation documents may stipulate that the institution or entity issuing the tender security and the institution or entity, if any, confirming the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity; 2/

(b) notwithstanding the provisions of subparagraph (a bis), a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an institution or entity in this State if the tender security and the institution or entity otherwise conform to requirements set forth in the solicitation documents(, unless the acceptance by the procuring entity of such a tender security would be in violation of a law of this State); * 3/

(b bis) prior to submitting a tender, a contractor or supplier may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirming institution, if required; the procuring entity shall respond promptly to such a request; 4/

(c) [moved to subparagraph (a bis)]

(d) the procuring entity shall specify in the solicitation documents any terms and conditions required to be included in the tender security concerning conduct by the contractor or supplier supplying the tender security that would entitle the procuring entity to claim the amount of the security. Those provisions may refer only to: 5/

(i) withdrawal or modification of a tender after the deadline for submission of tenders;

(ii) [deleted] 6/

(iii) failure to sign a procurement contract if required by the procuring entity to do so, or failure to provide a required security for the performance of the contract after a tender has been accepted.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall, without delay, return or procure the return of the tender security document, 7/ after the earliest to occur of:

(a) the expiry of the tender security,

(b) the entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required,

(c) the termination of the tendering proceedings without the entry into force of a procurement contract,

(d) the withdrawal of the tender in connection with which the tender security was supplied prior to the deadline for the submission of tenders.

---

* The text appearing within parentheses would only be incoporated by enacting States with legislation restricting the acceptance of tender securities issued by foreign issuers.

Notes

1. Pursuant to A/CN.9/359, para. 140, the definition of "tender security", which formerly appeared in article 2(f), has been incorporated in article 26. Concerning the modifications of that definition, see A/CN.9/359, para. 31. The definition has also been reworded so as to avoid the implication that it is the contractor or supplier that is itself to issue the tender security.

2. See A/CN.9/359, para. 142.

3. The final words of paragraph (1) (b) have been placed in parentheses to indicate their optional character, and the corresponding explanatory footnote has been added, pursuant to A/CN.9/359, para. 144. See also A/CN.9/359, para. 145.

4. The foregoing provision has been added pursuant to A/CN.9/359, para. 143, and has been brought under the purview of article 9 bis (1) and (2). The Working Group may wish to consider whether it would be appropriate to add language reserving the right of the procuring entity to reject a tender security despite the fact that the acceptability of the issuer had been confirmed pursuant to paragraph (1)(b bis) in the event that, following the confirmation of acceptability, the issuer became insolvent or that the procuring entity discovered that the issuer was insolvent.

5. Subparagraph (d) has been reformulated pursuant to A/CN.9/359, para. 146.

6. See A/CN.9/343, para. 221.

7. The specification that the return of a tender security was to be to the contractor or supplier that supplied it has been deleted so as to accommodate fulfilment of the return-of-the-security requirement through return of the security to the issuer.

* * *

SECTION VII. EVALUATION AND COMPARISON OF TENDERS 1/

Note

1. The heading of Section VII has been simplified.

* * *

Article 27. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for the submission of tenders, or at the deadline

specified in any extension of the deadline, at the place and in accordance with the procedures specified in the solicitation documents.

(2) All contractors and suppliers that have submitted tenders or their representatives shall be permitted by the procuring entity to be present at the opening of tenders.

(3) The name and address of each contractor or supplier whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to contractors and suppliers that have submitted tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article 10 ter (1).

* * *

Article 28. Examination, evaluation and comparison of tenders

(1) (a) The procuring entity may ask contractors and suppliers for clarifications of their tenders in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.

(b) Notwithstanding subparagraph (a), the procuring entity shall correct purely arithmetical errors apparent on the face of a tender. The procuring entity shall give notice of the correction to the contractor or supplier that submitted the tender. 1/

(1 bis) (a) Subject to subparagraph (b), the procuring entity may regard a tender as responsive only if it conforms to all requirements set forth in the tender solicitation documents. 2/

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in the solicitation documents. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.

(2) The procuring entity shall not accept a tender: 3/

(a) if the contractor or supplier that submitted the tender is not qualified; 4/

(b) if the contractor or supplier that submitted the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1)(b);

(c) if the tender is not responsive.

(d) [deleted] 5/

(3) [incorporated in article 10 quater]

(4) [incorporated in paragraph (1 bis) 2/

(5) [deleted] 6/

(6) [deleted] 7/

(7) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected pursuant to paragraph (2) or to article 10 quater in order to ascertain the successful tender, as defined in subparagraph (c), in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents.

(b) [deleted] 8/

(c) The procuring entity shall specify in the solicitation documents that the successful tender shall be:

(i) the tender with the lowest tender price, subject to any margin of preference applied pursuant to subparagraph (e); or

(ii) if the procuring entity has so stipulated in the solicitation documents, the lowest evaluated tender ascertained on the basis of factors specified in the solicitation documents, which factors shall, to the extent practicable, be objective and quantifiable, and shall be given a relative weight in the evaluation procedure or be expressed in monetary terms wherever practicable.

(d) In determining the lowest evaluated tender in accordance with subparagraph (c)(ii), the procuring entity may consider only the following:

(i) the tender price, subject to any margin of preference applied pursuant to subparagraph (e);

(ii) the cost of operating, maintaining and repairing the goods or construction, the time for delivery of the goods or completion of construction, the functional characteristics of the goods or construction, the terms of payment and of guarantees in respect of the goods or construction;

(iii) the effect that acceptance of a tender would have on the balance of payments position and 9/ foreign exchange reserves of [this State], the countertrade arrangements offered by contractors and suppliers, the extent of local content, including manufacture, labor and materials, in goods being offered by contractors and suppliers, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills [... (the enacting State may expand subparagraph (iii) by including additional factors)]; 10/ and

(iv) national defence and security considerations.

(e) If authorized by the procurement regulations, (and subject to approval by . . . (each State designates an organ to issue the approval),) in evaluating and comparing tenders, a procuring entity may grant a margin of preference for the benefit of tenders for construction by domestic contractors and suppliers or for the benefit of tenders for domestically produced goods. The margin of preference shall be calculated in accordance with the procurement regulations. 11/

(8) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency for the purpose of evaluating and comparing tenders.

(8 bis) Whether or not it has engaged in prequalification proceedings pursuant to article 8 bis, the procuring entity may require the contractor or supplier submitting the tender that has been found to be the successful tender pursuant to article 28(7)(c) to reconfirm its qualifications in accordance with criteria and procedures conforming to the provisions of article 8. The criteria and procedures to be used for such reconfirmation shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(8 ter) If the contractor or supplier submitting the successful tender is requested to reconfirm its qualifications in accordance with paragraph (8 bis), but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (7), from among the remaining tenders, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders.

(9) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to contractors or suppliers or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision of which tender should be accepted, except as provided in article 10 ter.

(10) [deleted] 12/

Notes

1. See A/CN.9/359, para. 151.

2. Pursuant to A/CN.9/359, paras. 35 and 155, the definition of a responsive tender, that formerly appeared in article 2(j), has been incorporated in article 28 by the addition of paragraph (1 bis), into which it also appeared to be appropriate to move the substance of paragraph (4). With such a configuration, the concept of responsiveness is defined prior to the use of the term "reponsive" in paragraph (2)(c).

3. See A/CN.9/359, para. 152.

4. See A/CN.9/359, para. 153.

5. See A/CN.9/356, para. 18.

6. See A/CN.9/331, para. 159.

7. See A/CN.9/331, para. 164.

8. See A/CN.9/331, para. 167.

9. See A/CN.9/359, para. 157.

10. An attempt has been made by the Secretariat to refine subparagraph (iii) so as to achieve greater clarity.

11. See A/CN.9/359, para. 160.

12. See A/CN.9/331, para. 176.

* * *

Article 29. Rejection of all tenders

(1) (Subject to approval by . . . (each State designates an organ to issue the approval), and) if so specified in the solicitation documents, the procuring entity may reject all tenders at any time prior to the acceptance of a tender. 1/ The procuring entity shall upon request communicate to any contractor or supplier that submitted a tender the grounds for its rejection of all tenders, but is not required to justify those grounds.

(1 bis) [deleted] 2/

(2) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1), towards contractors and suppliers that have submitted tenders.

(3) Notice of the rejection of all tenders shall be given promptly to all contractors and suppliers that submitted tenders.

Notes

1. See A/CN.9/359, para. 164, concerning the deletion of the reference to the case of failed reconfirmation proceedings.

2. See A/CN.9/356, para. 46.

* * *

Article 30. Negotiations with contractors and suppliers

No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a tender submitted by the contractor or supplier.

* * *

SECTION VIII. [moved to chapter III, section I]

Article 31. [moved to articles new 33 bis and 33 bis]

* * *

SECTION IX. [heading deleted] 1/

Note

1. In order to simplify the structure of the Model Law, the heading that appeared as Section IX, "Acceptance of tender and entry into force of procurement contract", has been deleted.

* * *

Article 32. Acceptance of tender and entry into force of procurement contract *

(1) Subject to articles 28(8 ter) and 29, the tender that has been ascertained to be the successful tender pursuant to article 28(7)(c) shall be accepted. Notice of acceptance of the tender shall be given promptly to the contractor or supplier submitting the tender.

(2) (a) Except as provided in paragraphs (3)(b) and (3 bis), a procurement contract in accordance with the terms and conditions of the accepted tender enters into force when the notice referred to in paragraph (1) is dispatched to the contractor or supplier that submitted the tender, provided that it is dispatched while the tender is in force and effect.

(b) The notice under paragraph (1) is "dispatched" when it is properly addressed or otherwise directed and transmitted to the contractor or supplier, or conveyed to an appropriate authority for transmission to the contractor or supplier, by a mode authorized by paragraph (6)(a). 1/

(3) (a) Notwithstanding the provisions of paragraph (2), the solicitation documents may require the contractor or supplier whose tender has been accepted to sign a written procurement contract conforming to the tender. In such cases, the procuring entity (the requesting ministry) ** and the contractor or supplier shall sign the procurement contract within a reasonable period of time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier.

(b) Where a written procurement contract is required to be signed pursuant to subparagraph (a), subject to paragraph (3 bis), the procurement contract enters into force when the contract is signed by the contractor or supplier and by the procuring entity. Between the time when the notice referred to in paragraph (1) is dispatched to the contractor or supplier and the entry into force of the procurement contract, neither the procuring entity nor the contractor or supplier shall take any action which interferes with the entry into force of the procurement contract or with its performance.

(3 bis) Where the procurement contract is required to be approved by a higher authority, the decision on whether to grant the approval shall be made within a reasonable time after the notice referred to in paragraph (1) is dispatched to the contractor or supplier. The procurement contract shall not enter into force or, as the case may be, be executed before the approval is given. 2/

(3 ter) Where an approval referred to in paragraph (3 bis) is required, the solicitation documents shall specify the amount of time following the dispatch of the notice of acceptance of the tender that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of tenders specified in the solicitation documents pursuant to article 25(1) or the period of effectiveness of tender securities that may be required pursuant to article 26(1).

(4) If the contractor or supplier whose tender has been accepted fails to sign a written procurement contract, if required to do so, or fails to provide any required security for the performance of the contract, the procuring entity shall select a successful tender in accordance with article 28(7) from among the remaining tenders that are in force, subject to the right of the procuring entity, in accordance with article 29(1), to reject all remaining tenders. The notice provided for in paragraph (1) shall be given to the contractor or supplier that submitted that tender.

(5) Upon the entry into force of the procurement contract and, if required, 3/ the provision by the contractor or supplier of a security for the performance of the contract, notice of the procurement contract shall be given to other contractors and suppliers, specifying the name and address of the contractor or supplier that has entered into the contract and the price of the contract.

(6) (a) [incorporated in article 9 bis]

(b) [moved to paragraph (2) (b)].

---

* Portions of the present article referring to the requirement of a signature of a procurement contract and the text within parentheses referring to the requirement of a final approval for entry into force of the procurement contract would only be incorporated in States in which such requirements are traditionally imposed. [Note added pursuant to A/CN.9/359, para. 169.]

** The term ""requesting ministry" would be incorporated by States in which the signed procurement contract, if required, is customarily signed by governmental entities for whom procurement is carried out, rather than by the governmental agency such as a central tendering board that conducts the procurement proceedings. [Note added pursuant to A/CN.9/359, para. 169.]

Notes

1. With the incorporation into article 9 bis of the formal requirements formerly set forth in paragraph (6)(a), it appeared appropriate to join the substance of paragraph (6)(b) with paragraph (2).

2. The Working Group may wish to consider the deletion of the requirement that the decision should be made within a reasonable time after the dispatch of the notice. Such a requirement might be considered as unnecessarily restrictive, as well as superfluous, since, in the case of excessive delay, the validity period of the tender would lapse. The Working Group may also wish to consider the deletion of the words "or, as the case may be, be executed" in the second sentence. It would appear that such a modification would be useful in view of the practice in a number of countries not to seek final approval before signature of the procurement contract -- practice which the current formulation fails to provide room for. The words "or Government" have been deleted as the reference to approval by a higher authority appeared sufficient.

3. See A/CN.9/359, para. 173.

* * *

Article 33. [incorporated in article 10 ter]

CHAPTER III. PROCUREMENT BY MEANS OTHER THAN TENDERING PROCEEDINGS

SECTION I. TWO-STAGE-TENDERING PROCEEDINGS

New Article 33 bis. Conditions for use of two-stage tendering

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may employ the procedures provided for in article 33 bis where:

(a) the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) due the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers; 1/

(b) [incorporated in subparagraph (a)]

Note

1. In A/CN.9/359, para. 198, the Working Group decided that two-stage tendering, request for proposals and competitive negotiation should be treated as equal options as regards cases in which the procuring entity

was unable to formulate complete specifications. An aspect of that approach, referred to in para. 196, was that each of those methods would share a common condition for use related to the case of incomplete specifications. That common condition now appears in subparagraph (a), as well as in new article 34 (a) and (b), article 33 ter(a) and new article 34 (a). It is intended to encompass the various factors behind incompleteness of specifications that were referred to in the former versions of those provisions. A number of questions arise from the decision to treat two-stage tendering, request for proposals and competitive negotiation as interchangeable with respect to cases of incomplete specifications, from the sharing by those three methods of a common condition for use, and from the application in that light of the order of preference in article 7(new 3). For a discussion of those questions, see note 2 under article 7.

* * *

Article 33 bis. Procedures for two-stage-tendering

(1) [moved to new article 33 bis]

(2) The provisions of chapter II of this Law shall apply to two-stage-tendering proceedings except to the extent those provisions are derogated from in the present section.

(3) The solicitation documents shall call upon contractors and suppliers to submit, in the first stage of the two-stage-tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the goods or construction as well as to contractual terms and conditions of their supply.

(4) The procuring entity may engage in negotiations with any contractor or supplier whose tender has not been rejected pursuant to articles 10 quater, 28(2), or 29 concerning any aspect of its tender.

(5) In the second stage of the two-stage-tendering proceedings, the procuring entity shall invite contractors and suppliers whose tenders have not been rejected to submit final tenders with prices with respect to a single set of specifications. In formulating those specifications, the procuring entity may delete or modify any aspect, originally set forth in the solicitation documents, of the technical or quality characteristics of the goods or construction to be procured, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law. Any such deletion, modification or addition shall be communicated to contractors and suppliers in the invitation to submit final tenders. A contractor or supplier not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the contractor or supplier may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article 28(7)(c).

(6) [incorporated in article 10 ter (1)(g)]

* * *

SECTION II. REQUEST-FOR-PROPOSALS PROCEEDINGS

Article 33 ter. Conditions for use of request for proposals

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of requests for proposals, which shall be addressed to as many contractors or suppliers as practicable, but to at least three, if possible, provided that the following conditions are satisfied:

(a) the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) due the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers; 1/

(b) the selection of the successful contractor or supplier is to be based on both the effectiveness of the proposal and on the price of the proposal; 2/ and

(c) the procuring entity has established the factors for evaluating the proposals and has determined the relative weight to be accorded to each such factor and the manner in which they are to be applied in the evaluation of the proposals.

(2) [moved to article 33 quater (new 1)]

Notes

1. Concerning the replacement of subparagraph (a) by a common condition to be shared also by two-stage tendering and competitive negotiation, see note 1 under new article 33 bis, as well as note 3 under article 7.

2. The Working Group may wish to consider whether it is necessary to retain subparagraphs (b) and (c). What is contained in subparagraph (b) appears to be implicit in subparagraph (a); subparagraph (c) concerns procedures to be followed when engaging in request-for-proposals proceedings, a subject which is covered in article 33 quater.

* * *

Article 33 quater. Procedures for request-for-proposals

(new 1) The procuring entity shall publish in a widely circulated trade journal a notice seeking expression of interest in submitting a proposal, unless for reasons of economy or efficiency the procuring entity considers it undesirable to publish such a notice; the notice shall not confer any rights on contractors or suppliers, including any right to have a proposal evaluated. 1/

(1) The factors referred to in article 33 ter (1)(c) shall concern:

(a) the relative managerial and technical competence of the contractor or supplier;

(b) the effectiveness of the proposal submitted by the contractor or supplier; and

(c) the price submitted by the contractor or supplier for carrying out its proposal and the cost of operating, maintaining and repairing the proposed goods or construction.

(2) A request for proposals issued by a procuring entity shall include at least the following information:

(a) the name and address of the procuring entity;

(b) a description of the procurement need including the technical and other parameters to which the proposal must conform, as well as, in the case of procurement of construction, the location of any construction to be effected;

(c) the factors for evaluating the proposal, expressed in monetary terms to the extent practicable, the relative weight to be given to each such factor, and the manner in which they will be applied in the evaluation of the proposal; and

(d) the desired format and any instructions, including any relevant time-frames, applicable in respect of the proposal.

(3) Any modification or clarification of the request for proposals, including modification of the factors for evaluating proposals referred to in article 33 ter (1)(c), 2/ shall be communicated to all contractors and suppliers participating in the request-for-proposals proceedings.

(4) The procuring entity shall treat proposals in such a manner so as to avoid the disclosure of their contents to competing contractors and suppliers. 3/

(5) The procuring entity may engage in negotiations with contractors or suppliers with respect to their proposals and may seek or permit revisions of such proposals, provided that the following conditions are satisfied:

(a) any negotiations between the procuring entity and a contractor or supplier shall be confidential;

(b) subject to article 10 ter, one party to the negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party;

(c) the opportunity to participate in negotiations is extended to all contractors and suppliers that have submitted proposals and whose proposals have not been rejected;

(d) [deleted] 4/

(6) Following completion of negotiations, the procuring entity shall request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

(7) The procuring entity shall employ the following procedures in the evaluation of proposals:

(a) only the factors referred to in paragraph (1), which shall be set forth in the request for proposals and in any modification thereof, shall be considered;

(b) the effectiveness of a proposal in meeting the needs of the procuring entity shall be evaluated separately from the price; 5/

(c) the price of a proposal shall only be considered by the procuring entity after completion of the technical evaluation; 5/

(d) the procuring entity may refuse to evaluate proposals submitted by contractors or suppliers it considers unreliable or incompetent.

(8) The award made by the procuring entity shall be in accord with the factors for evaluating the proposals set forth in the request for proposals, as well as with the relative weight and manner of application of those factors indicated in the request for proposals. 6/

Notes

1. The foregoing provision has been moved from article 33 ter (2) pursuant to A/CN.9/359, para. 180. The Working Group may wish to consider not restricting publication of the notice to trade journals since in some cases such specialized journals might not exist. This could be done simply by deleting the word "trade".

2. See A/CN.9/359, para. 186.

3. See A/CN.9/359, para. 187.

4. See A/CN.9/359, para. 188.

5. The Working Group decided in A/CN.9/359, para. 190, that the procedures set forth in subparagraphs (b) and (c) should be presented as optional or illustrative. In light of that decision, it might be preferable to delete those subparagraphs from the Model Law and to present them in a commentary.

6. See A/CN.9/359, para. 191.

* * *

SECTION III. COMPETITIVE-NEGOTIATION PROCEEDINGS

New Article 34. Conditions for use of competitive negotiation

(Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation in the following circumstances:

(a) the procuring entity is unable to formulate detailed specifications for the goods or construction and, in order to to obtain the most satisfactory solution to its procurement needs,

(i) it seeks proposals as to various possible means of meeting its needs; or,

(ii) due the technical character of the goods or construction, it is necessary for the procuring entity to negotiate with contractors or suppliers; 1/

(b) when there is an urgent need for the goods or construction and engaging in tendering proceedings would therefore be impossible or imprudent, provided that the circumstances giving rise to the urgency were not foreseeable by, or a result of dilatory conduct on the part of, the procuring entity;

(c) when the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs; 2/

(d) when the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that competitive negotiation is the most appropriate method of procurement; or

(e) when tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to articles 10 quater, 28(2) or 29, and when engaging in new tendering proceedings would be unlikely to result in a procurement contract;

(f) [deleted] 3/

Notes

1. Concerning the replacement of subparagraph (a) by a common condition to be shared also by two stage tendering and request for proposals, see note 1 under new article 33 bis, as well as note 3 under article 7.

2. See note 2 under article 7 concerning the overlap between the conditions for use of competitive negotiation and for single-source procurement with respect to research contracts.

3. See A/CN.9/356, paras. 116 and 117.

* * *

Article 34. Procedures for competitive negotiation

(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of contractors and suppliers to ensure effective competition.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a contractor or supplier shall be communicated on an equal basis to all other contractors and suppliers engaging in negotiations with the procuring entity relative to the procurement.

(3) Negotiations between the procuring entity and a contractor or supplier shall be confidential, and, except as provided in article 10 ter, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.

(3 bis) Following completion of negotiations, the procuring entity shall request all contractors or suppliers remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. 1/

(4) [incorporated in article 10 ter].

Note

1. See A/CN.9/359, para. 202.

* * *

SECTION IV. REQUEST-FOR-QUOTATIONS PROCEEDINGS

New Article 34 bis. Conditions for use of request for quotations

(1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of a request for quotations for the procurement of readily available goods that are not specially produced to the particular specifications of the procuring entity 1/ and for which there is an established market, provided that the estimated value of the procurement contract is less than the amount set forth in the procurement regulations.

(2) The procuring entity shall not divide its procurement into separate contracts for the purpose of invoking paragraph (1).

Notes

1. See A/CN.9/359, para. 204.

* * *

Article 34 bis. Procedures for request for quotations

(1) [moved to new article 34 bis]

(2) [moved to new article 34 bis]

(3) The procuring entity shall request quotations from as many contractors or suppliers as practicable, but from at least three, if possible. Each contractor or supplier from whom a quotation is requested shall be informed whether any elements other than the charges for the goods themselves, such as transportation and insurance charges, customs duties and taxes, are to be included in the price. 1/

(3 bis) Each contractor or supplier is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a contractor or supplier with respect to a quotation submitted by the contractor or supplier.

(4) The procurement contract shall be awarded to the contractor or supplier that gave the lowest priced quotation responsive to the needs of the procuring entity and that is considered reliable by the procuring entity. 2/

(5) [incorporated in article 10 ter]

Notes

1. See A/CN.9/359, paras. 207 and 208.

2. The foregoing provision has been reformulated so as to clarify the notion of responsiveness of the quotation.

* * *

SECTION V. SINGLE SOURCE PROCUREMENT

Article 35. Single-source procurement

(new 1) (Subject to approval by . . . (each State designates an organ to issue the approval),) the procuring entity may procure the goods or construction by soliciting a proposal or price quotation from a single contractor or supplier when:

(a) [deleted] 1/;

(b) the goods or construction are available only from a particular contractor or supplier, or a particular contractor or supplier has exclusive rights in respect of the goods or construction, and no reasonable alternative or substitute exists;

(c) due to a catastrophic event, there is an urgent need for the goods or construction, making it impossible or imprudent to use other methods of procurement because of the amount of time involved in using those methods; 2/

(d) the procuring entity, having procured goods, equipment or technology from a contractor or supplier, determines that additional supplies must be procured from that contractor or supplier for reasons of standardization or because of the need for compatibility with existing goods, equipment or technology, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited 3/ size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods in question;

(e) the procuring entity seeks to enter into a contract with the contractor or supplier for the purpose of research, experiment, study or development leading to the procurement of a prototype, except where the contract includes the production of goods in quantities to establish their commercial viability or to recover research and development costs; 4/

(f) the procuring entity applies this Law, pursuant to article 1(2), to procurement involving national defence or national security and determines that single source procurement is the most appropriate method of procurement; or

(g) procurement from a particular contractor or supplier is necessary in order to promote a policy specified in article 28(7)(d)(iii) and approval is obtained following public notice and adequate opportunity to comment, provided that procurement from no other contractor or supplier is capable of promoting that policy;

(h) [deleted] 5/;

(i) [deleted] 6/.

(new 1 bis) [deleted] 7/

(1) [incorporated in article 10 ter]

(2) [incorporated in article 10 ter]

Notes

1. See A/CN.9/356, para. 136.

2. See A/CN.9/356, para. 212, concerning the deletion of the reference to unforeseeability and to lack of dilatory conduct on the part of the procuring entity. The Working Group may wish to further consider the possibility of deleting the restriction to a catastrophic event since the meaning of that term is not clear.

3. See A/CN.9/359, para. 213.

4. See A/CN.9/359, para. 213, and note 2 under article 7 concerning the need to distinguish between urgency as a ground for the use of competitive negotiation (article new 34(b)) and urgency as a condition for the use of single-source procurement.

5. See A/CN.9/356, para. 144.

6. See A/CN.9/356, para. 145.

7. See A/CN.9/356, para. 146.

* * *

CHAPTER IV. REVIEW *

---

* States enacting the Model Law may wish to incorporate the articles on review without change or with only such minimal changes as are necessary to meet particular important needs. However, due to constitutional considerations, States might not see fit, to one degree or another, to incorporate those articles. In such cases, the articles on review may be used to measure the adequacy of existing review procedures. [Note added pursuant to A/CN.9/359, para. 246.]

* * *

Article 36. Right to review

(1) Subject to paragraph (2), any contractor or supplier that has an interest in obtaining a procurement contract resulting or anticipated to result from procurement proceedings covered by this Law and that claims to suffer, to risk suffering or to have suffered loss due to an act or decision of, or procedure followed by, the procuring entity, that is in breach of a duty imposed by this Law may seek review of the act, decision or procedure in accordance with articles 37 through [41]. 1/

(2) The following shall not be subject to the review provided for in paragraph (1):

(a) Acts or decisions of, or procedures followed by the procuring entity with respect to the selection of a method of procurement pursuant to article 7;

(b) the limitation of procurement proceedings in accordance with article 8 ter to domestic contractors or suppliers or on the basis of nationality;

(c) the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 12(2)(a);

(d) a decision by the procuring entity under article 29(1) to reject all tenders;

(e) a refusal by the procuring entity to respond to an expression of interest in participating in request-for-proposals proceedings pursuant to article 33 quater (new 1).

Note

1. Article 36 has been reformulated and restructured pursuant to A/CN.9/359, paras. 216 and 217. The Working Group may wish to take this occasion to consider further which aspects of the Model Law should not be subject to the review provisions.

* * *

Article 37. Review by procuring entity (or by approving authority)

(1) Unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. (However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an authority pursuant to this Law, the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure.) A reference in this Law to the head of the procuring entity (or the head of the approving authority) includes any person designated by the head of the procuring entity (or by head of the approving authority, as the case may be). 1/

(2) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, unless it was submitted within 10 days of when the contractor or supplier submitting it became aware of the circumstances giving rise to the complaint or of when that contractor or supplier should have become aware of those circumstances, whichever is earlier. 2/

(3) The head of the procuring entity (or of the approving authority) shall not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.

(4) Unless the complaint is resolved by mutual agreement of the contractor or supplier 3/ that submitted it and the procuring entity, the head of the procuring entity (or of the approving authority) shall, within 20 working days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken. 3/

(5) If the head of the procuring entity (or of the approving authority) does not issue a decision by the time specified in paragraph (4), the person submitting the complaint (or the procuring entity) is entitled immediately thereafter to institute proceedings under article [38 or 40]. Upon the institution of such proceedings the competence of the head of the procuring entity (or of the approving authority) to entertain the complaint ceases.

(6) The decision of the head of the procuring entity (or of the approving authority) shall be final unless proceedings are instituted under article [38 or 40]. 4/

Notes

1. In accordance with A/CN.9/359, para. 219, the various references in the review provisions to the approving authority have been placed within parentheses in order to align those references with the optional character of the approval requirement in the Model Law.

2. See A/CN.9/359, para. 220.

3. See A/CN.9/359, para. 222.

* * *

Article 38. Administrative review *

(1) A contractor or supplier entitled under article 36 to seek review may submit a complaint to [insert name of administrative body]: 1/

(a) if the complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract, and provided that the complaint is submitted within 10 days after the earlier of the time when the contractor or supplier submitting it became aware of the circumstances giving rise to the complaint or the time when that contractor or supplier should have become aware of those circumstances;

(b) pursuant to paragraph (5) of article 37, provided that the complaint is submitted within 10 days after the expiry of the period referred to in article 37(4); or

(c) if the contractor or supplier 2/ claims to be adversely affected by a decision of the head of the procuring entity (or of the approving authority) under article 37, provided that the complaint is submitted within 10 days after the issuance of the decision.

(1 bis) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity (or to the approving authority).

(2) The [insert name of administrative body] may [grant] [recommend] ** one or more of the following remedies, unless it dismisses the complaint:

(a) declare the legal rules or principles that govern the subject matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity, other than any act or decision bringing the procurement contract into force; 3/

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision, other than any decision bringing the procurement contract into force; 3/

(f) [deleted] 4/

(g) require the payment of compensation for

Option I

any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings

Option II

loss suffered by the person submitting the complaint

as a result of an unlawful act or decision of, or procedure followed by, the procuring entity; 5/

(h) order that the procurement proceedings be terminated.

(3) The [insert name of administrative body] shall issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(4) The decision shall be final unless an action is commenced under article 40.

---

* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit article 38 and provide only for judicial review (article 40).

** Optional language is presented in order to accommodate those States where review bodies do not have the power to grant the remedies listed below but can make recommendations.

Notes

1. The writing requirement has been incorporated in article 9 bis.

2. See A/CN.9/359, para. 227.

3. See A/CN.9/359, para. 229.

4. See A/CN.9/356, para. 174.

5. See A/CN.9/359, para. 231.

* * *

Article 39. Certain rules applicable to review proceedings under article 37 [and article 38]

(1) Promptly after the submission of a complaint under article 37 [or article 38], the head of the procuring entity (or of the approving authority) [, or the [insert name of administrative body], as the case may be,] shall notify all contractors and suppliers participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2) Any such contractor or supplier whose interests are or could be affected by the review proceedings has a right to participate in the review proceedings. 1/

(3) A copy of the decision of the head of the procuring entity (or of the approving authority) [, or of the [insert name of administrative body], as the case may be,] shall be furnished within [5] days to the contractor or supplier submitting the complaint, to the procuring entity and to any other contractor or supplier or governmental authority that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice legitimate commercial interests of the parties or would inhibit fair competition. 2/

Notes

1. The Working Group may wish to consider whether to add a provision to the effect that a contractor or supplier that failed to participate in the review proceedings would be barred from subsequently raising the same type of claim.

2. See A/CN.9/359, para. 236.

* * *

Article 40. Judicial review

The [insert name(s) of court(s)] has jurisdiction over actions commenced pursuant to article 36 to review an act or decision of, or a procedure followed by, the procuring entity, including over petitions for judicial review of decisions reached by review bodies under article 37 [and 38]. 1/

Note

1. See A.CN.9/359, para. 238.

* * *

Article 41. Suspension of procurement proceedings 1/

(1) The timely submission of a complaint under article 37 [or article 38] suspends the procurement proceedings for a period of 5 working days, provided that the complaint includes a declaration affirming that, to the best of its knowledge, the contractor and supplier will suffer irreparable injury in the absence of a suspension, it is probable that the complaint will succeed and the granting of the suspension would not cause disproportionate harm to the procuring entity or to other contractors and suppliers.

(2) When the procurement contract enters into force upon issuance of a notice of acceptance, the timely submission of a complaint under article 38 shall suspend performance of the procurement contract for a period of 5 working days, provided the complaint meets the requirements set forth in paragraph (1). 2/

(3) The head of the procuring entity (or of the approving authority), [the [insert name of administrative body]] may extend the suspension provided for in paragraph (1), [and the [insert name of administrative body]] may extend the suspension provided for in paragraph (2),] in order to preserve the rights of the contractor or supplier submitting the complaint or commencing the action pending the disposition of the review proceedings. 3/

(4) The suspension provided for by this article shall not apply if the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the grounds for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.

Notes

1. Article 41 has been reformulated pursuant to A/CN.9/359, paras. 242 to 245.

2. In A/CN.9/359, para. 243, it was decided that, in cases in which the issuance of the notice of acceptance itself triggered entry into force of the procurement, a suspension should be available. Paragraph (2) implements this decision, but only with respect to complaints filed under article 38, in view of the fact that, under article 37(3), neither the procuring entity nor the approving authority may entertain a complaint once the procurement contract has entered into force. The Working Group may wish to consider whether the dissymmetry as to the availability of suspension that therefore results between States that have administrative review and those that do not should be addressed and alleviated in some manner.

3. The Working Group may wish to consider whether the Model Law should place any overall limitation on the duration of the suspension.

* * *

Article 42. [deleted] 1/

Note

1. See A/CN.9/356, para. 192.

* * *